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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/676,620	10/02/2000	Francis Lawrence Richter	163.1406US01	3125

23552 7590 05/01/2003
MERCHANT & GOULD PC
P.O. BOX 2903
MINNEAPOLIS, MN 55402-0903

EXAMINER

DELACROIX MUIRHEI, CYBILLE

ART UNIT PAPER NUMBER

1614

DATE MAILED: 05/01/2003

17

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/676,620	RICHTER ET AL.	
	Examiner	Art Unit	
	Cybille Delacroix-Muirheid	1614	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 23 December 2002.

2a) This action is **FINAL**. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

4) Claim(s) 1,6-16,19-23 and 28-39 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1, 6-16, 19-23, 28-39 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Disposition of Claims

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) Notice of References Cited (PTO-892) 4) Interview Summary (PTO-413) Paper No(s). _____.
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) Notice of Informal Patent Application (PTO-152)
 3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____. 6) Other:

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DETAILED ACTION

1. Claims 1, 6-16, 19-23, 28-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Andrews 5,569,461 (already of record) and Kabara 5,208,257 (already of record) in view of Kross, WO 00/13506 (submitted by Applicant).
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Response to Amendment

The following is responsive to Applicant's amendment received Dec. 23, 2002.

Claims 2, 3, 5, 17, 24, 25, 27 are cancelled without prejudice or disclaimer. New claims 38 and 39 are added. Claims 1, 6-16, 19-23, 28-39 are currently pending.

The previous claims rejection under 35 USC 112, paragraph 1, set forth in paragraph 1 of the office action mailed Sep. 24, 2002 is withdrawn in view of Applicant's amendment and the remarks contained therein.

However, Applicant's arguments traversing the previous claims rejection under 35 USC 103(a) set forth in paragraphs 3-4 of the office action mailed Sep. 24, 2002 have been considered but are not found to be persuasive.

Said rejection is maintained essentially for the reasons given previously in the office action mailed Sep. 24, 2002 with the following additional comment:

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It is essentially Applicant's position that the prior art does not disclose an antimicrobial composition comprising an antimicrobial component consisting essentially of heptanoic acid. Applicant argues that the prior art discloses antimicrobial components that require the addition of significant active ingredients other than heptanoic acid. For example, the Andrews and Kabara references disclose antimicrobial compositions that require propylene glycol and fatty acid esters for its antimicrobial activity. None of the references, disclose that heptanoic acid is a sufficient antimicrobial agent.

Said arguments have been considered but are not found to be persuasive.

The transitional phrase "consisting essentially of" limits the scope of a claim to the specified materials or steps "and those that do not materially affect the basic and novel characteristic(s)" of the claimed invention. *In re Herz*, 537 F.2d 549, 551-52, 190 USPQ 461, 463 (CCPA 1976). If an applicant contends that additional steps or materials in the prior art are excluded by the recitation of "consisting essentially of," applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant's invention. *In re De Lajarte*, 337 F.2d 870, 143 USPQ 256 (CCPA 1964). Please see MPEP 2111.03. In this case, Applicant has not clearly shown, on the record, how the additional antimicrobial ingredients of the prior art would materially change the characteristics of the claimed invention. The prior art to Kabara discloses antimicrobial compositions containing heptanoic acid, thus suggesting that heptanoic acid has antimicrobial activity. Applicant has not clearly argued how the additional antimicrobial

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components of the prior art, which Applicant attempts to exclude, would not materially affect the antimicrobial activity of heptanoic acid and thus the overall composition.

With respect to new claims 38-39, applicant has the burden of showing that the introduction of additional steps or components would materially change the characteristics of applicant's invention. *In re De Lajarte*, 337 F.2d 870, 143 USPQ 256 (CCPA 1964). Since, Applicant has not argued how "consisting essentially of" serves to exclude the additional freezing depressant components in the prior art, these claims are rejected for reasons given previously in the office action mailed Sep. 24, 2002. Namely, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine additional anti-freeze polyols such as propylene glycol and glycerin, into one composition with the reasonable expectation that the additive effect of the polyols would result in an effective freeze-resistant antimicrobial composition.

It is for these reasons that the rejection stands.

Claim Objections

3. Claim 39 is objected to because of the following informalities: in claim 39, line 1, before "wherein the freezing point depressant", the term "wherein" is duplicitous and should be deleted. Appropriate correction is required.

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Conclusion

Claims 1, 6-16, 19-23, 28-39 stand rejected.

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cybille Delacroix-Muirheid whose telephone number is (703) 306-3227. The examiner can normally be reached on Tue-Fri from 8:30 to 6:00. The examiner can also be reached on alternate Mondays.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marianne Seidel, can be reached on (703) 308-4725. The fax phone number for this Group is (703) 308-4242.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1235.

CDM
CM
April 28, 2003

Marianne Seidel
DRAFTSMAN
PRIMARY EXAMINER